IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

NO. 78-1629

PETER JAMES PETSAS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TOPICAL INDEX

TABLE OF AUTHORITIES

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The Petitioner PETER JAMES PETSAS respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on January 11, 1979. The order denying the Petition for Rehearing In Banc

in the United States Court of Appeals for the Ninth Circuit was filed on March 28, 1979.

OPINION BELOW

The opinion of the Court of Appeals appears as Appendix A hereto. A copy of the Order denying the Petition for Rehearing in the United States Court of Appeals for the Ninth Circuit is attached hereto as Appendix B.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on January 11, 1979. A timely Petition for Rehearing and Suggestion for Rehearing In Banc was denied on March 28, 1979. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. May Rules 607 and 609(a) of the Federal Rules of Evidence be properly and constitutionally construed as permitting the government to present the testimony

of a witness who is a business associate of the Defendant with the express purpose of impeaching that witness with a prior felony conviction for a similar but unrelated offense, thus establishing a strong and impermissible inference of Defendant's guilt by association?

2. Although counsel for Defendant did not receive "rap sheets" showing lengthy arrest records of several key witnesses until the day prior to trial, the trial judge denied counsel's request for time to obtain certified court records of convictions of the witnesses for impeachment purposes, refused counsel's request that government agents be instructed to assist in obtaining such records, restricted counsel's attempt to impeach the witnesses pursuant to Rule 609, Federal Rules of Evidence, to the sole question whether they had been convicted of a felony offense, directed that the answer of the witnesses had to be accepted, and refused to allow questions by counsel concerning possible parole or probationary status of the witnesses. Under these circumstances, was Defendant denied his con-

stitutional right to effective cross-examination of witnesses, and was this Court's ruling in Davis v. Alaska, 415 U.S. 308 (1974) ignored by the courts below?

STATUTORY PROVISIONS INVOLVED

Rule 607, Federal Rules of Evidence, 28 U.S.C., provides:

> "The credibility of a witness may be attacked by any party calling him."

Rule 609(a), Federal Rules of Evidence, 28 U.S.C., provides:

> ". . . For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross-examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of punishment."

STATEMENT OF THE CASE

Defendant was convicted of making false statements to the Department of Housing and Urban Development in connection with transactions involving sales of homes by Defendant to persons who testified at trial that they did not know they had purchased a home, but, rather, believed that they were only renting. The sole significant factual issue at trial was whether false statements made on government forms were the result of Defendant's deceit, or, rather, were the responsibility of purchasers who needed federal assistance in obtaining a loan that would enable them to buy a home. Witness credibility was a singularly important factor in the circumstances.

Defendant sought a one-week continuance of the trial because, although earlier requests had been made, the

prosecution had not provided "rap sheets" on key government witnesses until the day prior to trial. While several of these witnesses had arrests on a variety of charges, including felonies, no dispositions were shown on the "rap sheets". Counsel for Defendant considered it essential for impeachment purposes that certified court records be obtained that would reflect convictions as well as the nature of the offense.

Upon denial of the continuance, defense counsel requested the trial judge to direct that a government agent render assistance in quickly obtaining public records necessary for impeachment under Rule 609(a), Federal Rules of Evidence. Refusing to require the government to do the Defendant's "spade work", the trial court ruled that Defendant must be satisfied with asking the witnesses whether they had prior convictions, and that the answers of the witnesses would have to suffice. In so ruling, the judge opined that he saw no danger in this procedure because he "preferred to believe" that if a witness were asked the question, he

"is not going to lie about it . . . he is going to answer it correctly for you."

Subsequent efforts of defense counsel to examine the witnesses concerning their criminal records, as well as their possible parole or probationary status when they were initially contacted by the government agents, resulted in a further restriction by the trial judge that defense counsel was "instructed that if you are going to inquire at all about, of any witness, as to past convictions you are only permitted to ask the one question: 'Have you ever been convicted of a felony?' Do not ask the question in any other form."

At trial, the government presented the testimony of one Sharon Barrow, an employee of a bank escrow department who was acquainted with Defendant and had in the past handled HUD transactions submitted by Defendant. The witness had been recently convicted of offenses similar to that of Defendant, and it was the prosecutor's admitted intention, from the outset, to impeach her with evidence of that conviction. Defendant objected

to this impeachment in a pre-trial motion in limine, and again at trial, on grounds that such evidence would accomplish nothing other than to create an improper inference of guilt by association, and that this was, in fact, the purpose of the prosecutor in calling the witness to begin with.

Defendants objection was overruled, the impeachment was permitted by the trial court, and the Court of Appeals, citing Rules 607 and 609(a), found there to be no error. Mrs. Barrow's conviction was, ironically, subsequently reversed by the Court of Appeals on grounds of insufficiency of the evidence.

REASONS FOR GRANTING THE WRIT

A. Rule 607, Federal Rules Of Evidence, Should Not Be Permitted To Be Used As A Device To Get Before The Jury Otherwise Inadmissible Evidence

The decision of the Court of Appeals below, in affirming the instant conviction, places a stamp of approval on a prosecution strategy of utilizing Rule 607, Federal Rules of Evidence, as a means of

introducing impermissible evidence to establish a strong and wholly improper inference of guilt by association.

Unquestionably, Rule 607 was enacted with a purpose of disallowing the defense "to create a false impression, or the jurors to think that the government was trying to keep something from them", United States v. Anderson, 532 F.2d 1218, 1230 (9th Cir. 1986); United States v. Morgan, 555 F.2d 238 (9th Cir. 1977); the Rule was clearly not intended, nor could it constitutionally be construed to permit, the prosecution to call as its own witness an associate of the accused with the intention from the outset of impeaching that witness with a similar conviction even though the accused had previously agreed not to offer such evidence himself. The impeaching evidence had no probative value apart from the impermissible inference that "birds of a feather flock together", and it was for this reason that the witness was called in the first instance.

This erroneous application and construction of Rule 607 should be condemned and foreclosed upon a review by this Court.

B. At Trial Defendant Was Clearly Denied His Right To Effective Cross-Examination, And In Affirming The Conviction, The Court Of Appeals Has Disregarded The Provisions Of Rule 609(a), Federal Rules Of Evidence And This Court's Holding In Davis v. Alaska, 415 U.S. 308, (1974)

As appears from the Statement of the Case, supra, the ruling of the Court of Appeals affirming Defendant's conviction is contrary to the express dictate of the Federal Rules of Evidence, and the established precedent of this Court, all of which unequivocally establish an accused's constitutional right to confront and cross-examine the witnesses against him by impeaching their credibility with evidence, including public records, of prior felony convictions or convictions of any offense involving dishonesty or false statement, as well as by evidence concerning the witnesses's status as a probationer or parolee. Rule 609(a), Federal Rules of Evidence; Davis v. Alaska, 415 U.S. 308

(1974).

The trial court's restriction of Defendant's examination and impeachment of the witnesses to the "one question" Have you ever been convicted of a felony?" was patently erroneous, and his refusal to permit Defendant an opportunity to inquire into possible probationary or parole status of witnesses with lengthy criminal records was flagrantly unconstitutional in a case in which the credibility of government witnesses was peculiarly questionable and especially important.

The Court of Appeals' decision to ignore this plain error in the record cannot be permitted to stand.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,
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Attorney for Petitioner

BROWN AND NEWTON
Attorneys at Law

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Appellee,	)	NO. 78-1090
v.	)	OPINION
PETER PETSAS, Appellant.	)	

Filed: Jan. 11, 1979
Emil E. Melfi, Jr., Clerk
U.S. Court of Appeals

Appeal from the United States District Court for the Central District of California

Before: ANDERSON and HUG, Circuit Judges, and SOLOMON*, District Judge

SOLOMON, District Judge:

Appellant, Peter Petsas was convicted by a jury of fifteen counts of causing false information to be submitted to the United States Department of Housing and Urban Development (HUD) in violation of 18 U.S.C. §1010. He was sentenced to

*The Honorable Gus J. Solomon, United States District Judge for the District of Oregon, sitting by designation.

eighteen months in prison and a $5,000 fine on Count One. He received concurrent eighteen month sentences for each of the fourteen other counts.

Petsas was in the business of buying houses, usually from the HUD, repairing and then selling them. Occasionally, he repaired and sold houses for others including the Chairman of the Board of Mechanics National Bank (Bank).

The Federal Housing Authority (FHA) insures mortgages on favorable terms, particularly for buyers who intend to occupy the houses. The FHA requires credit reports, verified statements of assets and a down payment from the buyers themselves.

To obtain FHA insured mortgage loans on his own houses or on houses which he repaired and was handling for others, Petsas would rent the houses but would falsely represent that the renters were buyers. Petsas got them to sign the necessary applications and forms to be delivered to the FHA. Some of them signed because they thought the forms were necessary to rent the houses. Others signed the forms in blank or without being given

the opportunity to read them. Still others could not read English.

Petsas usually took the forms to the Bank to process and submit to the FHA for approval. Petsas worked with Sharon Barrow, an employee in the escrow department of the Bank. He gave her "down payments" on the houses and at times she gave him false verifications of deposits not yet made.

When the FHA made the commitment to guarantee the mortgage, the Bank loaned the money and distributed the mortgage proceeds. When there was surplus on the deposits for closing costs, checks for the surplus payable to the buyers were delivered to Petsas who had them endorse and return the checks to him.

Deferred Prosecution Agreement

Petsas contends that the indictment should have been dismissed because of his December 1975 agreement with the government. Petsas was then charged with a misdemeanor for a similar false statement. The government agreed to defer prosecution and place Petsas on informal probation for one year. The government promised that it

would not press the charge if Petsas completed the probation. Petsas agreed to these terms.

Petsas in the court below asserted that an FBI agent assured him that, if he signed the agreement, he would not be prosecuted for any related crime. And Petsas contends that these offenses which arose before that time, which arose before that time, which include Magana and Wesley, must be dismissed to enforce the agreement.

The government denied that the agent had authority to make such an agreement and also denied that the agent made it.

The district court, after a hearing, found against Petsas. This ruling was amply supported by the evidence.

Petsas also contends that this prosecution is barred because he was not indicted until after he completed his probation. There is no merit to this contention. Due process does not obligate the government to immediately indict probationers on other charges.

Petsas' motion to dismiss the indictment was properly denied.

Continuance

Petsas contends that the court abused its discretion when it denied his motion for a second continuance.

Petsas was indicted September 26, 1977 and arraigned a week later. Thereafter, his trial was set for October 28. Petsas retained a new attorney immediately before this trial date. On the 28th, the court permitted the new attorney to be substituted and continued the case until November 22 on the understanding that Petsas would not seek another continuance. Notwithstanding this agreement, Petsas on November 21 moved for another continuance. This motion was denied and the trial started on November 22.

The granting of a continuance is committed to the discretion of the trial court. United States v. Bryan, 534 F.2d 205, 206 (9th Cir. 1976). Petsas has not pointed out any additional evidence which he would have been able to present at a later trial or demonstrate that his defense was by the denial prejudiced. There was no abuse of discretion here. United States v. Makley, 468 F.2d 916, 917 (9th

Cir. 1972).

Government Impeachment of Its Own Witness

Petsas also contends that the court abused its discretion when it permitted the government to impeach Sharon Barrow, its witness with her prior felony convictions.

The witness was employed by the Bank when these mortgages were arranged and she worked on some of the transactions. She was convicted for false statements to the FHA in connection with some of them.

Before trial, Petsas stated that he would not impeach Barrow with this conviction and he then moved to prohibit the government from impeaching her. The court instructed the government not to impeach her for this conviction although it indicated that it would reconsider this ruling if it later thought that she was lying.

Barrow testified about bank procedures and Petsas' activities as a go-between. She testified that she falsely completed deposit verifications and that Petsas deposited down payments for apparent buyers after she delivered deposit verification forms to him.

. The court then asked Barrow why she falsely verified that down payments were already deposited and she said that she thought verification was unnecessary. Government counsel asked for permission to impeach her because her answers to the court's questions were false. Over Petsas' objection, the court granted the request and permitted the government to bring out that Barrows had been convicted of a felony.

Petsas contends that the government called Barrow solely to impeach her. The record however shows that Barrow gave relevant and material testimony about bank procedures and Petsas' acts.

We are persuaded that the ruling was correct, but even if erroneous, it was harmless. Rules 607 & 609(a), Fed. R. Evid.; Rule 52(a), F.R. Cr. Proc.; United States v. Binger, 469 F.2d 275, 276 (9th Cir. 1972).

Habit Evidence

Petsas offered testimony of other purchasers in support of his contention that he routinely acted honestly. The court properly excluded this testimony.

See Fed. R. Evid. 404(b). But the court did permit Petsas' character witnesses to testify about his honesty.

Evidence

Petsas contends that the evidence does not support the convictions.

Rafael Magana testified through an interpreter. He said that he and his wife got in touch with Petsas after they saw the For Rent sign on the house. They told Petsas that they wanted to rent it.

At Petsas' request, Magana signed the mortgage insurance papers so that he could rent the house. He did not read the forms because he could not read Engligh. He said he never intended to buy the house, did not make a down payment and that the statement of assets in the form was overstated.

Magana's wife also testified through an interpreter. She signed the forms because Petsas told her it was necessary so that he could check their credit.

James and Loretta Wesley also got in touch with Petsas because of a For Rent sign. They signed the mortgage insurance papers at the request of Petsas who told

them to sign so that they could get an option to buy the house. They did not read the forms and signed some of them in blank. They did not make a deposit of $600.00 as stated in the forms, their assets were overstated and the statement that they had money on hand from savings to make the down payment was incorrect.

Wesley received a check for $62.34 from the Bank, which was the difference between the actual closing costs and the amount he was supposed to have deposited. He gave it to Petsas.

Petsas received money paid out on mortgages insured by the FHA as a result of false statements. The evidence that Petsas caused these false statements in the mortgage insurance applications amply supports the convictions on the Magana Counts (I and II) and the Wesley Counts (VII and VIII).

Other Counts

Under the concurrent sentence doctrine, it is unnecessary to consider the other eleven counts. Nevertheless, we have examined each contention made by Petsas directed towards these counts and

find that none have an adverse collateral effect on Petsas' conviction. United States v. Wing, 450 F.2d 806 (9th Cir. 1971), cert. denied, 405 U.S. 994 (1972); United States v. Walls, 577 F.2d 690, 699 (9th Cir. 1978), cert. denied, 47 U.S.L.W. 3246 (1978). In fact none of these contentions have any merit.

AFFIRMED

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. PETER JAMES PETSAS, Defendant-Appellant.	NO. 78-1090 O R D E R

Filed: Mar. 28, 1979
Emil E. Melfi, Jr., Clerk
U. S. Court of Appeals

Before: ANDERSON and HUG, Circuit Judges, and SOLOMON, *Senior District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

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* The Honorable Gus J. Solomon, Senior United States District Judge for the District of Oregon, sitting by designation.

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.